

November 17, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citadel Energy Products, LCC

Date of Filing: July 9, 2004

Case Number: TFA-0066

On July 9, 2004, Citadel Energy Products, LCC (Citadel) filed an Appeal from a determination issued by the Energy Information Administration (EIA) of the Department of Energy (DOE) on June 7, 2004. In its determination, EIA denied Citadel's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require EIA to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that is required to be withheld or may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

In a letter dated August 27, 2003, Citadel submitted a FOIA request to EIA for "(i) the actual sum total of working gas in each geographical region reported in Form 912s on a weekly basis and (ii) the actual sum total of working gas in each region reported in Form 191s on a monthly basis by those parties required by the EIA to submit Form 912s." Request Letter dated August 27, 2003, from Jeffrey W. Mayes, Attorney for Citadel, to Abel Lopez, Director, FOIA/Privacy Act Office, DOE. Citadel sought aggregated data (the "aggregated data") by regions, for the period from the time EIA began gathering the data until the present and into the future. Data regarding individual firms were not sought; however, if the information Citadel requested was not available on any existing document, Citadel requested, in the alternative, redacted copies of the Forms 191 and 912. The

information contained in these two forms is monthly and weekly natural gas inventories in underground storage facilities.

On October 24, 2003, EIA denied the request. EIA withheld the information, claiming it was exempt from disclosure under Exemption 4. EIA claimed that the information Citadel was seeking is protected because it was "commercial or financial information obtained from a person [which is] privileged or confidential." Citadel filed an Appeal, in which it disputed the withholding of information under Exemption 4. First, Citadel asserted that EIA did not explain its withholding of the aggregated data. Appeal dated November 26, 2003, at 8 from Jeffrey W. Mayes, Attorney for Citadel, to George B. Breznay, Director, OHA. Secondly, Citadel argued that EIA failed to show that its ability to obtain the information in the future would be impaired. *Id.* at 6. On January 12, 2004, this Office granted Citadel's Appeal and remanded the matter to EIA, stating that EIA had failed to indicate whether a document with the aggregated figures existed and, therefore, had inadequately justified its withholding of any such document. *Citadel Energy Products, LCC*, Case No. TFA-0048, 28 DOE ¶ 80,316 (2004).

Responding to the remand, in a June 7, 2004 determination, EIA indicated that it did have some of the requested aggregated information, but it withheld the information on the basis of Exemption 4. Citadel then filed this Appeal claiming that EIA failed to meet the applicable standard for withholding under Exemption 4.⁷

II. Analysis

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

⁷In a letter dated November 5, 2004, EIA informed this Office and Citadel that EIA had conducted an additional review for the purpose of identifying documents responsive to Citadel's FOIA request. EIA found that, at the time of Citadel's FOIA request, EIA had the requested aggregated data from the weekly Form EIA-912 in the form of only two documents created for the weeks of August 8 and August 15, 2004. EIA also found that it did not have any documents containing the requested aggregated data from the monthly Form EIA-191. With that letter, EIA released to Citadel, and to OHA, redacted copies of those two documents. EIA withheld from those two documents, pursuant to Exemption 4, the aggregated data, the names of individual companies, and the individual company data, for the reasons explained in EIA's determinations dated October 24, 2003, and June 7, 2004. Letter dated November 5, 2004, at 1-3 from Kenneth A. Vagts, Director, Office of Oil and Gas, EIA to Janet R. H. Fishman, Attorney-Examiner, OHA, with a copy to Jeffrey W. Mayes, Attorney for Citadel. The release of the redacted documents does not affect our analysis in this Decision.

5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*). By contrast, information that is provided to an agency *voluntarily* is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879. Because the two forms involved here are mandatory filings under the Federal Energy Administration Act of 1974 (P.L. 93-275), we find that the withheld information was involuntarily submitted to EIA. *BP Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,796 (1999); *see William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Thus, as we have held previously, for this information to be properly withheld under Exemption 4, the *National Parks* test must be met.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

Finally, to qualify for Exemption 4 protection under *National Parks*, information must also be "confidential." Withheld information is "confidential" if it meets the test set out in *National Parks*. In this case, the withheld information is considered "confidential" if release would either (a) cause substantial harm to the competitive position of submitters or (b) impair EIA's ability to obtain the necessary information in the future. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

B. Application of Exemption 4 to the withheld information

1. "Commercial or Financial" information requirement

As stated earlier, the first requirement under the *National Parks* test is that the withheld information must be "commercial or financial." In *Public Citizen*, the court held that these

terms should be given their ordinary meaning and that records are commercial so long as the submitter has a “commercial interest” in them. *Public Citizen*, 704 F.2d at 1290. We find, as shown in section 3, that the underlying information that would be revealed if the aggregated data were released is commercial information.

2. “Obtained from a person” requirement

The second requirement under *National Parks* is that the information must be “obtained from a person,” with “person” referring to a wide range of entities, including corporate entities. *Comstock Int’l, Inc. v. Export-Import Bank* 464 F. Supp. 804, 806 (D.D.C. 1979). EIA has convinced us, as demonstrated in next section, that even though the aggregated data are not directly “obtained from a person,” the information that can be derived from those figures are equivalent in practical terms to the information obtained from the firms themselves. See, e.g., *Gulf and Western Industries v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (Exemption 4 held to protect government report which contained information supplied by an outside party or from which information supplied by an outside party could be extrapolated). The reach of Exemption 4 is sufficiently broad to protect the commercial information of third parties, here, the reporting firms. See, e.g., *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 405 (D.C. Cir. 1980). Since release of the aggregated data would be tantamount to release of the underlying information, we believe that the information was effectively “obtained from a person,” i.e., the reporting firms.

3. “Confidentiality”/“Competitive Harm” requirement

As described above, the withheld information may be considered “confidential” if release would either (a) cause substantial harm to the competitive position of submitters or (b) impair EIA’s ability to obtain the necessary information in the future. EIA has concluded that release of the withheld information would cause substantial harm to the competitive position of the firms whose natural gas holdings are included in the aggregated data contained in the withheld information.

Analyzing whether release would cause substantial competitive harm involves two elements: 1) whether the submitters face actual competition and 2) whether disclosure would likely cause substantial competitive injury. *National Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

In the present case, it seems beyond dispute that the submitters face actual competition from other natural gas marketing firms. Consequently, the remaining element to be evaluated in the determination of substantial competitive harm is whether disclosure of the data would likely cause substantial competitive injury. *National Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

In demonstrating the possible competitive injury that could result from release of the information, EIA indicated in its June 7, 2004 determination, as background, that the United States is divided into three reporting regions for the purposes of these forms. EIA does not require every firm in each region to report. Rather, the reporting requirement is periodically rotated among the firms, except for the largest of the firms which must always report. In each of these regions, there are a limited number of large firms that always report because of their size. EIA argues because there are only three reporting regions for Form 912 and only 119 total firms that can be selected for reporting, it would be easy to identify the value of the holdings of the largest firms. EIA gave an example from one of the reporting regions to support its contention. The example stated

EIA staff identified the report *Natural Gas Week* (NGW) [as a private publication] that publishes individual company-level underground gas storage information. EIA chose one NGW issue issued during the period covered by the FOIA request. That issue included company-level data reported by 13 companies that choose to participate in the NGW survey.

Using the information from that issue of the NGW, EIA analyzed the EIA-912 survey responses consistent with the NGW report period. First EIA considered the NGW information as publicly known. Then EIA examined the individual EIA-912 survey data and removed those companies whose underground gas storage data were available from the NGW. The data for the remaining companies were then analyzed to determine if the release would result in providing information that could be used to develop reasonable estimates of what those companies reported to EIA.

In the West Consuming Region, EIA identified the EIA-912 sample companies for which NGW did not publish information on working gas in underground storage. If EIA were to release the aggregated data requested under the FOIA, the public would be able to subtract the known NGW information from the aggregated data and calculate the total for the remaining companies that choose to keep their information confidential. Using the information for those companies, the total gas held in storage was 108 billion cubic feet (Bcf). The largest company was responsible for 84 Bcf (77.78%), the second largest for 10 Bcf (9.26%), and the remaining companies for 14 Bcf (12.96%). The two largest companies were responsible for more than 87% of the total for those companies. Releasing the unweighted aggregate total with one large company responsible for such a large percentage of the number and two companies responsible for more than 87% would violate EIA's standards for data protection and generally accepted statistical practices for protection of confidential information.

To further explain the pq rule [a rule developed to determine whether a given value could reveal individual respondent information, and explained earlier in EIA's June 7, 2004 determination] with respect to the above illustration, we can assume that there is enough publicly available information about the industry available for a knowledgeable user to estimate the amounts held by one company to within plus or minus 50%.

Assuming that the second largest company wants to estimate the working gas held in storage by the largest company, the second largest subtracts its reported value (10) from the total (108) for the companies. Conservatively assuming the second largest company can estimate the aggregate of the smaller companies within 50%, their aggregate would be in the range of 7 to 21 Bcf (14+/-7). Thus, the second largest company is able to estimate that the largest company's working gas in storage is between 91 (108-10-7) and 77 (108-10-21) Bcf. Given that the largest company's reported value is 84 Bcf, the range allows the second largest company to make a close approximation of the data for the largest company.

Determination Letter dated June 7, 2004, at 4-5, from Kenneth A. Vagts, Director, Office of Oil and Gas, EIA, to Jeffrey W. Mayes, Attorney for Citadel.

Citadel disagrees with EIA's contention. Citadel does not believe EIA's argument to be valid and attempts to use figures similar to EIA's example to reach a different conclusion. Citadel states

An analysis of the application of the EIA's theory of disclosure to a scenario based on this information reveals that in fact disclosure of Aggregate Data would not allow the informed observer to estimate with reasonable accuracy the holdings of individual storage operators who had not already disclosed those holdings.

In the West Consuming Region, the region with storage concentrated under the control of the fewest entities . . . [with] eight operators accounting for 95 percent of the total storage (similar to the proportion accounted for by the EIA's regional sample group). The largest three operators account for 32-, 21-, and 20-percent shares. Should Questar, the fourth largest operator, attempt to derive from the EIA's Aggregate Data the confidential amounts held by other respondents applying the EIA's method for deriving confidential information, it would not discover anything. Questar starts knowing its own total, 59 Bcf, and the regional total of 598 Bcf It could then closely estimate the holdings of the three larger storage operators for publicly available sources, even if it could not obtain the specific figure

reported on these entities' Form 191s. This leaves four smaller operators that have stored amounts of, respectively 28, 23, 19 and 8 Bcf, and an aggregate total of 78 Bcf. If Questar sought to determine the market positions of these entities, estimating, say Puget Sound within plus or minus 50 percent of its actual of 19 Bcf, a range of 10-29 Bcf, Questar would then know that the remaining non-disclosing storage operators held among them anywhere from 49-68 Bcf ($78 - 29 = 49$; $78 - 10 = 68$). Because this spread must now be allocated among three remaining entities, two approximately the same size and one smaller, Questar would fail to disclose any company-specific confidential information. Any allocation would be wholly speculative, and Questar would not have exposed the market position of any one of them. Moreover, this spread is as great as 68 percent of the size of the largest holding—much larger than the plus-or-minus 50-percent spread in the Guidelines.

Appeal Letter dated July 9, 2004, at 9-10, from Jeffrey W. Mayes, Attorney for Citadel, to George B. Breznay, Director, Office of Hearings and Appeals.

The FOIA puts the burden on EIA to support its withholding by showing that release of the aggregated information would cause competitive injury to the submitters of the underlying information. Citadel has attempted to show that EIA has not met its burden. We find EIA's argument to be more persuasive than Citadel's. As a basic point, we note that EIA's example is based upon the actual information that Citadel is requesting. In contrast, Citadel's example is based upon only publicly available information and different facts (four firms instead of three). In order to substantiate its claim of competitive harm, EIA does not need to show that all of the companies' gas holdings can be determined using the information at issue, merely that one company's gas holdings can be determined.

EIA has explained that the largest firms in each region hold such a proportionately large share of the market that one of those largest firms can extrapolate, by removing its own data from the currently protected aggregated figures, the size of one of the other largest firm's holdings to within a certain range. This range is sufficiently narrow to cause competitive harm to the largest firm if the aggregated information were released. At most, Citadel has only demonstrated that it is not possible to accurately calculate the gas holdings of every single firm in a particular region. This still does not refute EIA's contention that the gas holdings of larger firms could be deduced from the information.

EIA has also convinced us that release of an individual firm's gas holdings indirectly through release of the withheld aggregated information would result in competitive harm to the individual firm. In its October 24, 2003 determination, EIA outlined the competitive harm that would occur if the requested information were released.

Because of other publicly available information about the storage industry, such as reports filed with the Federal Energy Regulatory Commission, State public utility commissions, EIA, and commercial databases and trade reports, there is general knowledge of the identity of operators and the location of underground natural gas storage fields for the three large storage regions. In some States, reporting firms that are both storage operators and regulated local distribution companies are required by the public utility commissions in the States in which they are located to provide a listing of their plans to meet obligations to supply working gas annually (and seasonally in some cases) and the amounts of gas in storage they have to meet those obligations. Were the names and amounts of gas to be publicly known, these companies' ability to meet those obligations would be revealed. A firm with small amounts of storage gas relative to its obligations would be negatively impacted in a current competitive sense because it would be at the mercy of those who would sell it gas to meet those obligations. Similarly, those in a flush position would be hard pressed to obtain the prices they were seeking were buyers to know that they had large quantities to sell.

Determination Letter dated October 24, 2003, at 2, from Kenneth Vagts to Jeffrey Mayes. We agree with EIA's assessment of the harm that could befall the submitters if the information were released.

III. Conclusion

We find that EIA correctly applied Exemption 4 to the withheld material. We concur with EIA's determination that release of the requested information would put submitters at a substantial competitive disadvantage. We also find EIA had met its burden of showing that release of the requested aggregated information would effectively be a release of the underlying information for individual firms, within a predicted range. Lastly, we also find that release of the requested information would cause submitters competitive harm were the information to be released. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See e.g., Vladeck, Waldmas, Elias & Engelhard, P.C.*, 27 DOE ¶ 80,230 at 80,835 (1999). Therefore, we uphold the EIA June 7 determination and decline to order that the information be released.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by Citadel Energy Products, LCC, on July 9, 2004, Case No. TFA-0066, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 17, 2004

CONCURRENCE SHEET

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Peer Review: Steve Fine
Valerie Adeyeye

OGC Review: Dow Davis
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